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December 21, 2006

Hon. Charles L. A. Terreni
Chief Clerk, Administrator
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, S. C. 29211



Re: Carolina Water Service, Inc. v. S. C. Office of Regulatory Staff
C/A 2005-CP-40-6133

Dear Sir:

I am enclosing copy of Order issued by Judge Allison Lee in the above matter.

Sincerely,

Barbara A. Scott

Barbara A. Scott

Bs

Encl.

# FORM 4

**STATE OF SOUTH CAROLINA**
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

**JUDGMENT IN A CIVIL CASE**
CASE NO. 05-CP-40-6133

Carolina Water Svs Inc
PLAINTIFF(S)

SC Office of Regulatory Staff
DEFENDANT(S)





*CHECK ONE.*

[ ] **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED** (*CHECK REASON*): [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ] Other _____.

[ ] **ACTION STRICKEN** (*CHECK REASON*): [ ] Rule 40(j) SCRCP; [ ] Bankruptcy; [ ] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other _____.

**IT IS ORDERED AND ADJUDGED:** [ ✓ ] See attached order; [ ] Statement of Judgment by the Court:

Dated at Cola, South Carolina, this 28 day of Nov, 2006

PRESIDING JUDGE

This judgment was entered on the ____ day of _____, 20____, and a copy mailed first class this 29 day of Nov, 2006 to attorneys of record or to parties (when appearing pro se) as follows:

J. Hefer

ATTORNEY(S) FOR THE PLAINTIFF(S)

C. Hammonds

ATTORNEY(S) FOR THE DEFENDANT(S)

s/BARBARA A. SCOTT

CLERK OF COURT

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | Case No. 2005-CP-40-6133 |
| Carolina Water Service, Inc., | ) | BOOK **RC** PAGE 31 |
| Petitioner, | ) | |
| v. | ) | **ORDER** |
| The South Carolina Office of Regulatory Staff, | ) | |
| Respondent. | ) | |



This matter is before the Court on a Petition of Carolina Water Service, Inc. ("CWS" or "Company") for judicial review of certain orders issued by the Public Service Commission of South Carolina ("Commission") ruling on CWS's application for an increase in its water and sewer rates which was filed pursuant to S.C. Code Ann. § 58-5-240 (Supp. 2004). For the reasons set forth below, and with the consent of the Respondent South Carolina Office of Regulatory Staff ("ORS"), the Commission's orders are reversed in part and the matter is remanded to the Commission for action consistent with this order.[1]

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[1]This matter was originally captioned "Carolina Water Service, Inc. v. **The Public Service Commission of South Carolina** and the South Carolina Office of Regulatory Staff". However, in its petition, CWS asserted that the Commission was named as a party respondent solely to protect CWS from a jurisdictional challenge which could arise from an apparent inconsistency between S.C. Code Ann. § 58-5-340 (1976) (which at the time this case was instituted, provided that an action for review of Commission orders is commenced in this Court "against the Commission") and a provision of 2004 S.C. Act 175, which is codified at S.C. Code Ann. § 58-3-60(A) (Supp.2005) (which precludes the Commission staff from participating in the underlying contested case proceeding as a party). CWS alleges in its Petition that, as a result of Act 175, the Commission was not a party below and is therefore not a party in the instant case. Respondent Office of Regulatory Staff ("ORS") has filed an answer to CWS's Petition admitting this allegation. Subsequent to the filing and service of CWS's petition, the Commission's counsel wrote to the Court on December 16, 2005, and informed the Court that "it appears that Act No. 175 passed by the General Assembly last year removes the Public Service Commission of South Carolina (the Commission) from the role of defending its own orders [although] the statutes are not completely clear." The Commission's counsel stated that his client generally

## I. BACKGROUND

CWS is a public utility authorized by the Commission to provide water and sewer services to some fifteen thousand eight hundred (15,800) customers in eleven counties in South Carolina. On December 17, 2004, CWS filed an application with the Commission seeking an increase in certain rates and modifications to its rate schedule. The requested rates, if approved, would have generated $1,801,488 in additional annual revenues for CWS.

The Commission scheduled a series of hearings to address the application of CWS. The Commission held four (4) public hearings in various parts of the state for the purpose of allowing customers to express their views on the application without having to travel to the Commission's offices in Columbia during which forty nine (49) of CWS's customers testified. Some of these customers complained about the quality of CWS's water and its service, while others complained about the rates that CWS charged and proposed to charge for its service. Additionally, CWS and

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denied the allegations of CWS's Petition, but that the Commission should be excused from participating in all further proceedings involving this Docket because of "the generally stated intent of the General Assembly in Act No. 175."

The Court notes that the General Assembly has clarified the intent of Act 175 in regard to the question raised by CWS by enacting certain "conforming amendments" to Act 175 in 2006 S.C. Act 318. Section 15 of Act 318 amends § 58-5-340 to conform to Act 175 by providing that "the commission must not be a party to the action [for judicial review]." This clarification is evidence of the legislature's intent that Act 175 precluded the Commission from participating in judicial review proceedings arising out of its own orders. *Stuckey v. State Budget and Control Bd.*, 339 S.C. 397, 529 S.E.2d 706 (2000). Act 318 also confirms the Commission's own belief that Act 175 removed the Commission from the role of defending its own orders. The Court further notes that under the Administrative Procedures Act ("APA"), only a party to a contested case hearing is entitled to participate as a party in a judicial review proceeding arising out of that contested case. *See, e.g., Byers v. S.C. Alcoholic Bev. Comm'n*, 281 S.C. 566, 316 S.E.2d 705 (Ct. App. 1984). The Court notes from the record in this case that the Commission was not a party in the contested case proceeding below and that its staff was specifically barred from participating as a party under §58-3-60(A). Thus, even assuming that Act 175 did not "remove the Commission from the role of defending its own orders", the Commission could not now participate in the instant judicial review proceeding as it was not a party below. Accordingly, the

ORS presented witnesses at a hearing before the Commission at the Commission's offices in Columbia on May 4 and 5, 2005.

As part of its duties as set forth in S.C. Code Ann. § 58-4-50 (Supp. 2005), ORS inspected CWS's water and sewer systems and conducted a business compliance audit of CWS. ORS found that CWS provided "adequate water provision/distribution and wastewater collection services and is operating its wastewater treatment facilities in compliance with all DHEC rules, regulations and consent orders." ORS also found CWS's "complaint records [were] maintained in accordance with [Commission Regulations] R.103-516 and R. 103-716" and that CWS had "adequate means...whereby each customer can contact...the utility at all hours in case of emergency or unscheduled interruptions of service in accordance with R. 103-514 and R. 103-714."

ORS also conducted a comprehensive audit of the company's books and presented a report of its findings in that regard and its recommended accounting adjustments at an "evidentiary hearing" held on May 4, 2005. At this hearing, one of CWS's witnesses agreed with the accounting adjustments proposed by ORS. Both CWS and ORS presented the testimony of expert witnesses with respect to the appropriate return on equity ("ROE")[2] which CWS should be permitted an opportunity to earn. CWS's expert witness testified that the utility should be permitted an opportunity to earn an ROE within a range of 11.40% to 11.50% with a recommended ROE of 11.50%. ORS's expert witness testified that the utility should be permitted an opportunity to earn an ROE within one of two ranges – 9.50% to 10.80% and

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Court concludes that the Commission is not a party in the instant case and directs that the case caption be revised to reflect that fact. See Rule 21, *SCRCP*.

[2]The rate of return on common equity is a key component of the calculation of a utility's allowable overall rate of return. *Porter v. S.C. Public Service Commission*, 333 S.C. 12, 507 S.E.2d 328 (1998).

10.10% to 11.10%. At this hearing, in addition to the testimony of CWS's and ORS's witnesses, the Commission also heard testimony from eight (8) more of the company's customers.

On June 22, 2005, the Commission issued Order No. 2005-328 denying CWS the increase in water and sewer rates requested by its application and instead granting a smaller increase. The order adopted all of the accounting adjustments proposed by ORS and accepted by CWS with the exception of an adjustment to net income to address customer growth. The order also concluded that an appropriate ROE for CWS was 9.10% based upon (i) the Commission's acceptance of the opinion of ORS's expert witness as to appropriate ranges of allowable ROEs, less four-tenths of one percent (.4%) to remove a positive adjustment for "flotation costs" the ORS witness had included in his estimated ranges of allowable ROEs, (ii) the Commission's decision to limit the allowable spread within these recommended ranges of ROEs to not more than one percent (1%), and (iii) the Commission's decision to "set[] rates at the low end of the range in order to minimize the impact on [CWS's] customers, while allowing the Company to realize a reasonable rate of return and maintain its financial viability." The Commission further concluded that the 9.10% ROE, when applied to CWS's capital structure and cost of debt, yielded an authorized return on rate base ("RORB") of 8.02%. Based upon the accounting adjustments and application of the 8.02% RORB to the utility's rate base[3] of approximately $15,000,000, the Commission found that CWS had an income requirement of $1,198,366. The Commission further concluded, that "to meet the income requirement, CWS must be allowed additional revenues of $1,146,000" and approved a rate schedule which it found was "designed

[3]"The 'rate base' is the amount of investment on which a regulated public utility is entitled an opportunity to earn a fair and reasonable return. A public utility's 'rate base' represents the total investments in, or fair value of, the used and useful property which it necessarily devotes to rendering the regulated services." *Porter, supra*, 333 S.C. at 13, 507 S.E.2d at 334, n.4, *citing Southern Bell v. PSC*, 270 S.C. 590, 244, S.E.2d 278 (1978)

to meet the revenue requirements of the Company." The Commission further concluded that the rates approved permitted the utility to earn an operating margin of 8.13%. See S.C. Code Ann. § 58-5-240(H) (Supp. 2005). In response to the testimony of the 54 customers, the Commission also ordered CWS to begin reporting to ORS certain information pertaining to customer complaints, ordered ORS to develop and conduct certain aesthetic quality tests on the Company's water, and ordered CWS to provide to the Commission and ORS copies of any notices of violation issued to CWS by the South Carolina Department of Health and Environmental Control ("DHEC").

Thereafter, CWS timely filed and served a petition for reconsideration of Order No. 2005-328 pursuant to S.C. Code Ann. § 58-5-330 (1976) and 26 S.C. Code Ann. Regs. 103-881 (Supp. 2004). Therein, CWS asserted, *inter alia*, that the Commission had erroneously adopted an ROE of 9.10%, that the Commission had erroneously rejected the customer growth adjustment proposed by ORS and agreed to by CWS and thereby understated the rates needed to permit the Company to earn its correct revenue requirement, and that the Commission had erroneously imposed certain environmental violation and customer complaint reporting requirements on CWS and certain water testing requirements on ORS. As an alternative to rehearing or reconsideration, CWS also sought approval of a bond to permit it to place rates into effect under bond pursuant to S.C. Code Ann. §58-5-240(D) (Supp. 2004). On October 17, 2005, the Commission issued its Order No. 2005-465 in which it denied CWS's petition for rehearing or reconsideration and approved the requested bond.[4]

After the Commission denied the petition for rehearing and reconsideration, CWS timely brought this action for judicial review pursuant to S.C. Code Ann. § 58-5-340 and placed into

[4] Commission Order Nos. 2005-328 and 2005-465 are collectively referred to herein as

effect under bond rates which it asserts permit it to collect its authorized additional revenues and correct revenue requirement pursuant to S.C. Code Ann. § 58-5-240(D) (Supp. 2004). ORS has filed an answer in this Court in which it admitted certain of the material allegations of CWS's petition for judicial review and denied other allegations.

## II. SCOPE OF REVIEW

Judicial review of a Commission decision is governed by the Administrative Procedures Act, under which a reviewing court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2005); *Hamm v. American Tel. & Tel. Co.*, 302 S.C. 210, 394 S.E.2d 842 (1990); *Welch Moving & Storage Co. v. Public Serv. Comm'n*, 301 S.C. 259, 391 S.E.2d 556 (1990). A court may, however, reverse or modify decisions that are clearly erroneous in view of the substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2005); *Welch, supra.* Substantial evidence to support a Commission decision exists if the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hamm v. S.C. Public Serv. Comm'n*, 315 S.C. 119, ___, 432 S.E.2d 454, 456 (1993). A court may also reverse or modify decisions that violate constitutional or statutory provisions, exceed the Commission's statutory authority, are made upon unlawful procedure, are affected by error of law, or are arbitrary and capricious or characterized by abuse of discretion. S.C. Code Ann. § 1-23-380(A)(6)(a)-(d), (f) (Supp. 2005); *see, e.g., Heater of Seabrook, Inc. v. Public Serv. Comm'n,* 324 S.C. 56, 478 S.E.2d 826 (1996) ("*Heater of Seabrook I*"); *South Carolina Cable Television Ass'n v. Public Serv. Comm'n*, 313 S.C. 48, 437 S.E.2d 38 (1993); *Nucor Steel v. South Carolina Pub. Serv. Comm'n*, 310 S.C. 539, 426 S.E.2d 319 (1992). Additionally, the

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"orders".

Commission's findings of fact set forth in statutory language must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. S.C. Code Ann. § 1-23-350 (Supp. 2005). The Commission's findings of fact must be set forth in sufficient detail to enable this court to determine whether they are supported by the evidence and whether the law has been properly applied to such findings. *Able Communications, Inc, v. S.C. Public Service Comm'n*, 290 S.C 409, 351 S.E.2d 151 (1986). Thus, implicit findings of fact are prohibited. *Id.*

Because the Commission's findings are presumptively correct, the party challenging a Commission order has the burden of showing that the decision is clearly erroneous in view of the substantial evidence on the whole record. *Heater of Seabrook I, supra; Patton v. South Carolina Pub. Serv. Comm'n*, 280 S.C. 288, 312 S.E.2d 257 (1984). For the following reasons, this Court concludes that CWS has carried its burden of showing clear error in certain aspects of the Commission's orders in this case, and that the orders must therefore be reversed in part and the case remanded for further action by the Commission consistent with this order.

## III. DISCUSSION

As noted above, CWS's petition for judicial review raises three basic issues – allowable ROE, rejection of ORS's proposed accounting adjustment for customer growth, and the imposition of certain measures relating to water quality testing and the reporting of environmental compliance and customer complaint information. CWS's contentions regarding these issues may be summarized as follows:

> (1) the Commission's adoption of an ROE of 9.10% was erroneous because (a) it was based upon a range of ROEs to which no witness had testified, (b) it was determined by imposition of an "artificial" limitation on ranges of allowable ROEs of which the company was not given prior notice, and (c) it was arrived at for the express purpose of favoring the interests of customers over the Company;
>
> (2) the Commission's rejection of the customer growth adjustment proposed by ORS and agreed to by CWS effectively imposed a customer growth adjustment on the Company's

allowable revenues without imposing a corresponding adjustment on the Company's allowable expenses, which is inconsistent with the Commission's prior precedent and its obligation to make adjustments for known and measurable events, and thereby understated the rates needed to permit the company to earn its authorized additional revenues and correct revenue requirement, and

(3) the Commission's imposition of (a) a requirement that ORS develop and conduct aesthetic water quality testing of CWS's water and (b) requirements that CWS (i) provide to the Commission and ORS copies of every notice of violation issued to the Company by DHEC and (ii) make bi-annual compilations of customer complaints and report them to ORS were contrary to or in excess of requirements stated under Commission regulations or exceeded the Commission's statutory authority.

With respect to all of these issues, CWS has also asserted that the Commission's actions were not supported by substantial evidence of record, arbitrary and capricious, characterized by an abuse of discretion, violated constitutional or statutory provisions, made upon unlawful procedure or affected by other errors of law. CWS's contentions will be discussed separately below.

A. **Return on Equity**

The Court begins with an analysis of the applicable standards for determining a fair return on CWS's rate base. The United States Supreme Court in the *Hope* and *Bluefield* cases has held that a utility's rates must be set such that it is afforded a rate of return on its investment that is commensurate with the returns on investments in other enterprises having corresponding risks, is sufficient to assure confidence in the utility's financial integrity, and allows the utility to maintain its credit and attract capital. *Southern Bell Tel. & Tel. Co. v. Public Serv. Comm'n*, 270 S.C. 590, 595-97, 244 S.E.2d 278, 281 (1978) (citing *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923) and *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944)); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310, 109 S.Ct. 609, 617, 102 L.Ed.2d 646, 659 (1989) ("[W]hether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on

what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return."); *Hamm v. Public Serv. Comm'n*, 310 S.C. 13, 17, 425 S.E.2d 28, 30-31 (1992) ("[T]he Commission must authorize sufficient revenue to afford utilities the opportunity to recover expenses and the capital cost of doing business."). Similarly, under its statutory charge to supervise and regulate the rates and service of every public utility in the state, the Commission must set just and reasonable rates that produce a just and reasonable level of return to the utility. *See* S.C. Code Ann. §§ 58-5-210, 58-5-290 (1976). "The Commission's determination of a fair rate of return must be documented fully in its findings of fact and based exclusively on reliable, probative and substantial evidence of record." S.C. Code Ann. §58-5-240(H) (Supp. 2005). Additionally, the adoption of an ROE outside of the range of ROEs to which witnesses have testified, after inappropriate adjustments are deleted (if any), would be error. *Porter, supra,* 333 S.C. at 22, 507 S.E.2d at 333, *citing Hamm v. PSC*, 309 S.C. at 287, 422 S.E.2d at 113. The PSC possesses only the power given it by the legislature and it may not act in excess of that authority. *S.C. Cable Television Ass'n v. The Public Service Commission of South Carolina*, 313 S.C. 48, __, 437 S.E.2d 38, 40 (1993).

In this case, the Commission summarized its determination regarding an appropriate ROE for CWS as follows:

> Having adopted the return-on-equity testimony of ORS witness Dr. Johnson with the removal of his inclusion of a 0.4% stock issuance adjustment, which the Commission has determined to be inappropriate, results in a return-on-equity range of 9.1 to 10.7%. The Commission determines a 1.0% range on return on equity is appropriate and concludes that a return-on-equity range of 9.1% to 10.1% is appropriate for CWS. The Commission notes that the Natural Gas Rate Stabilization Act signed by the Governor on February 16, 2005, directs the Commission to specify a 1.0% cost of equity range for natural gas utilities regulated by this Commission. Also, the parties agreed to, and the Commission adopted, a 1.0% range for return on equity in the recent South Carolina Electric & Gas Company rate case.

After explaining its determination with respect to the Company's allowable cost of capital, the Commission went on to explain its adoption of a 9.1% ROE from the foregoing range by stating that:

> We are setting rates at the low end of the range in order to minimize the impact on the Company's customers, while allowing the Company to realize a reasonable rate of return and maintain its financial viability.

Based upon these determinations, the Commission found that it was allowing CWS an opportunity to earn a RORB of 8.02%.

The Court concludes that the Commission's effort to "minimize the impact on the Company's customers" exceeds its statutory authority. As alluded to in note 1 *supra*, the General Assembly has recently restructured the Commission's role in utility ratemaking matters by its enactment of S.C. Act 175. Much of the Commission's former authority has devolved upon ORS[5] and it is this agency, and not the Commission, which is charged with the duty of representing the "public interest" in utility ratemaking matters. See S.C. Code Ann. § 58-4-10. For that purpose, the legislature has provided in § 58-4-10(B) that

> 'public interest' means a balancing of the following:

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[5]Among other things, as a result of Act 175 the Commission is no longer authorized to conduct audits, investigations or examinations of public utilities (§58-4-50(2) (Supp. 2005) and §58-3-200 (Supp. 2005)), investigate complaints against public utilities (§58-4-50(5) (Supp. 2005)), propound interrogatories to or question public utilities (*cf.*, §58-3-190 (1976) and §58-3-190 (Supp. 2005)), or have its staff participate in contested cases before the Commission (§58-3-60(A)). In addition, the Commission is now subject to the Code of Judicial Conduct as contained in Rule 501 of the South Carolina Appellate Court Rules. See S.C. Code Ann. §58–3-30(B). ORS, on the other hand, is automatically made a party of record in contested cases (§58-4-10(B)) and has the discretion and duty to review and investigate rates changed by a public utility (§58-4-50(A)(1)), inspect, audit and examine public utilities (§58-4-50(A)(2)) and investigate the service of public utilities (§58-4-50(A)(3)). Other duties of ORS include the duty to investigate complaints made regarding public utilities and, when appropriate, make recommendations to the Commission regarding same (§58-4-50(A)(5)) and, on its own or upon request of the Commission, make studies and recommendations to the Commission with respect to standards, practices, regulations or services of public utilities. §58-4-50(A)(6-7).

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(1) concerns of the using and consuming public with respect to public utilities services, regardless of the class of customer;
(2) economic development and job attraction and retention in South Carolina, and
(3) preservation of the financial integrity of the state's public utilities and continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.[6]

Thus, it is the function of ORS and not the Commission to ascertain and address the concerns of CWS's customers. Because ORS did not assert to the Commission that the public interest required setting ROE at the bottom of an otherwise allowable range to minimize the impact of the rate adjustment on customers, the Commission's undertaking to do so *sua sponte* exceeded its statutory authority and was, thus, error. *S.C. Cable Television, supra.*

The Court also concludes that the Commission's determination to set ROE at the low end of the adopted range for the purpose of minimizing the impact on CWS's customer is unsupported by substantial evidence of record. In its initial order, the Commission stated that its determination regarding the range of ROEs was based upon the testimony of the expert witnesses for CWS and ORS. However, there is nothing in the testimony of either witness regarding adoption of ROE at the low end of a range for the purpose of favoring customers. Furthermore, the Commission's order denying rehearing fails to describe the substantial evidence of record upon which this determination was based. To the contrary, in this order the Commission states only that it "may come to any reasonable conclusion that is supported by the evidence, and, again, the 9.1% is within the range of returns found in this case." This fails to explain the Commission's basis for favoring customers in this manner and the evidence supporting its determination in this regard. *Cf. Able, supra.* CWS's assertion that the Commission's orders are

[6] By express terms of the statute, this definition addresses the role of ORS in utility regulation, not the PSC. The PSC is not given, by statute, any duty or authority to address or determine public interest in water and wastewater rate settlement proceedings.

not supported by substantial evidence of record, and thus do not comply with §58-5-240(H), is therefore correct. *Heater of Seabrook, Inc. v. The Public Service Commission of South Carolina*, 332 S.C. 20, 503 S.E.2d 739 (1998).

In view of the foregoing, the Court finds it unnecessary to address CWS's other two contentions regarding the Commission's determination of ROE. The Commission is reversed with respect to its determination that 9.1% is a reasonable ROE for CWS. Although the Commission is being reversed in this regard, it is not necessary for the issue of an appropriate ROE to be remanded to the Commission. The parties have stipulated that the disposition of the next issue and the associated relief is sufficient to provide CWS the relief necessary to resolve the issue of an appropriate level of earnings for CWS.

B. **Customer Growth**

ORS proposed an adjustment to account for CWS's projected customer growth, the effect of which would have been to increase CWS's net operating income by $23,825. The Commission observed that this proposed adjustment was "based on the Commission's established formula method." The Commission found that "CWS did not propose a separate calculation for Customer Growth as a component of Income for Return", but that CWS had included in the financial statements attached to its application a "customer growth factor" in its calculation of water and sewer revenues which would result from adoption of the proposed rates containing a "Customer Growth Factor" of 6.34% and 2.49%. The Commission noted that, at the hearing, "CWS agreed to the ORS report which included growth in revenue and also included a growth calculation using net operating income." The Commission determined that, because it had accepted the revenue calculation at proposed rates which included the 6.34% and 2.49% "growth factors", it could not approve the customer growth adjustment proposed by ORS.

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In its petition for rehearing or reconsideration on this point, CWS asserted that the Commission's determination erroneously required recognition of growth only with respect to the Company's proposed revenues without recognizing growth with respect to the expenses which would be incurred in generating additional revenues from the proposed rates. CWS further asserted that it had not proposed any customer growth adjustment, that there was no substantial evidence to support the Commission's determination in that regard, and that the Commission's determination had the effect of overstating the company's revenue requirement and understating the rates needed to achieve its authorized revenue requirement. In its order denying CWS's petition, the Commission found that the Company and ORS had agreed to two alternate methods for measuring customer growth. Based upon that finding, the Commission concluded that it was free to choose either method and that its choice to deny the ORS customer growth adjustment was not error. For the reasons discussed below, the Court concludes that the Commission's ruling in this regard was error.

The Supreme Court has recognized that the Commission's established method of calculating customer growth, which involves an adjustment to net income, is proper because it takes into account "the average expense attributable to generating per customer income." *Porter v. S.C. Public Service Commission and Carolina Water Service, Inc.*, 328 S.C. 222, 230, 493 S.E.2d 92, 96-97 (1997). Moreover, the determination of "adjustments for known and measurable changes in expenses are within the discretion of the Commission." *Id.* "Absolute precision is not required so long as adjustments are 'known and measurable with a degree of reasonable certainty.'" *Id.* An abuse of discretion exists when an administrative agency's decision is controlled by an error of law or fact. *Bursey v. SCDHEC*, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004); *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987); *Steinke v. LLR*, 336

S.C. 373, 398, 520 S.E.2d 142, 155. Here, the Commission's decision was controlled by errors of both law and fact.

As to the latter, there is nothing contained in the record in this case which supports the Commission's finding in its order denying rehearing that "the Company and ORS agreed on a methodology that contained **alternate** ways to address customer growth". To the contrary, the record is clear that CWS and ORS had advanced **both** the calculation of revenues under proposed rates (which included the 6.34% and 2.49% "growth factors") and the customer growth adjustment to net income contained in ORS's report. Nowhere in the record is there any statement by either CWS or ORS that the proposed revenue figure was offered as an alternate to the ORS proposed customer growth adjustment. Nor do either of the Commission's orders refer to any such statement on the part of CWS or ORS.[7] This is acknowledged in the Commission's initial order which found that "[a]t the hearing, CWS agreed to the ORS Report which included growth in revenue and also a growth calculation using net operating income." Thus, the Commission's conclusion in its order denying rehearing that CWS and ORS had proposed alternate methods of addressing customer growth is factually incorrect.

As to the former, the Commission acknowledged that the ORS proposed customer growth adjustment was consistent with "the Commission's established formula method." Although administrative agencies like the Commission are not bound by the principle of *stare decisis*, they may not arbitrarily depart from their prior precedent. *330 Concord Street Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992). In the instant case, the applicable prior precedent is the Commission's determination in *Porter* that a customer growth adjustment

[7]The Commission states in its order denying rehearing that "in the Parties' stipulation, the Company saw fit to agree to the revised ORS audit report which included Customer Growth by

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for CWS properly includes an adjustment to net operating income "since it reflects the average expense attributable to generating per customer income." *Id.* And, as CWS pointed out in its petition for rehearing, the Commission applied the precedent from *Porter* in the Company's last rate case.[8] However, the Commission did not in its order denying rehearing address CWS's argument regarding adherence to these precedents.

A decision may be found to be arbitrary if it results from inconsistent application of regulatory authority. *Cf. Mungo v. Smith*, 289 S.C. 560, 517, 347 S.E.2d 514, 521 (Ct. App. 1986). Here, the Commission has exercised its authority to make adjustments for known and measurable changes resulting from customer growth in a manner that is clearly inconsistent with its prior precedent since it has recognized the effect of customer growth on CWS's revenues without concomitantly recognizing the effect of customer growth on CWS expenses. Accordingly, the Commission's order arbitrarily departs from the Commission's prior precedents, which recognize that a customer growth adjustment for CWS should apply to both revenues and expenses, and is therefore in violation of *330 Concord Street.* [9]

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two different methods." The Court has been unable to find in the record any stipulation between CWS and ORS.

[8]The Court takes notice of Commission Order No. 2001-887, August 27, 2001, Docket No. 2000-207-WS, which is cited in CWS's petition for rehearing and reconsideration, wherein the Commission held, *inter alia*, that "any adjustment for customer growth must necessarily also take into account increases in expenses. While it cannot be stated with absolute certainty that the addition of customers adds expenses in a directly proportionate manner, one cannot assume that the addition of customers does not increase expenses. [The Consumer Advocate's] proposed adjustment only factors in one side of the equation (i.e., revenues) and ignores expenses."

[9]In its initial order, the Commission concluded that application of the holding in *330 Concord Street* and the holding in *Hamm v. S.C. Public Serv. Comm'n,* 309 S.C. 282, 422 S.E.2d 110 (1992), which precludes the Commission's reliance upon its past practices as a sole basis for Commission action, was "contradictory." The Court finds that no contradiction exists. The holding in *330 Concord Street* addresses the circumstance where an agency arbitrarily departs from a prior precedent while *Hamm* addresses an agency's failure to adequately state the facts upon which it relies for a given determination and defaults to its "past practices" as justification for that determination. In the instant case, the Commission states no basis for imposing a

In view of the foregoing, the Court finds that the Commission erred in rejecting ORS's proposed customer growth adjustment. The Commission is reversed on this issue and the matter is remanded to the Commission with instructions that it adopt the customer growth adjustment proposed by ORS and set rates such that CWS will be allowed an opportunity to earn additional annual revenues of $1,117,000 in the manner asserted in CWS's petition to the Commission for rehearing or reconsideration.

### C. Direction to ORS To Test CWS Water and Imposition of Additional Reporting Requirements on CWS

The Commission found that, as a result of the testimony it heard from fifty-seven of the Company's approximately fifteen thousand eight hundred customers at the hearings conducted by the Commission in this case, it was necessary for the Commission to adopt certain measures applicable to CWS pertaining to "customer service, water quality and compliance with the regulations of the South Carolina Department of Health and Environmental Control (DHEC)." Included in these measures were requirements that ORS develop and conduct tests for the aesthetic quality of CWS's water, that the Company file with the Commission and ORS every notice of violation CWS receives from DHEC, and that the Company compile and provide to ORS certain periodic information pertaining to customer complaints in addition to the information required to be compiled and filed under Commission regulations. For the reasons discussed below, the Commission is reversed with respect to its imposition of all three of these measures.

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customer growth adjustment on revenues only in contravention of its precedent established in *Porter* and in the Company's last rate case. This is the violation of *330 Concord Street*. On the other hand, had the Commission adopted ORS's proposed customer growth adjustment based solely upon the precedent established in *Porter*, with no discussion of the underlying testimony of ORS's witness which supported the adjustment and no explanation of why it agreed with that testimony, then a violation of the holding in *Hamm* would have resulted.

As the court has already noted, the Commission may not act in a manner that exceeds its statutory authority. *S.C. Cable Television, supra.* Similarly, the Commission may not act in a manner that is contrary to the provisions of its own regulations. See *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998). Although the Commission's interpretation of statutes and regulations which it is charged with administering is entitled to deference and will not be overturned by a court absent cogent and compelling reasons, a court is obliged to do so where such an interpretation is contrary to the plain meaning of the language of the statute or regulation in question. *Converse Power Corp. v. S.C. Dep't of Health and Env. Control*, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002). And, as with any determination of the Commission, there must be supporting substantial evidence of record. *Welch, supra.*

1. Water Testing

With regard to the Commission's requirement that ORS develop and conduct tests to ascertain the aesthetic quality of CWS's water, the Court concludes that the Commission lacks authority to impose such a requirement and that, even if it did have such authority, there is no substantial evidence of record to support an exercise of such authority in this case.

In its initial order, the Commission ordered ORS "to develop tests for compliance with 26 S.C. Code Ann. Regs. 103-770 and other applicable statutes and regulations which require water to be potable, and insofar as practicable, free from objectionable odor, taste, color and turbidity." ORS was further ordered to "conduct such tests [on CWS's water systems] within twelve months from the date of [the] Order in such frequency as [ORS] deems necessary to ascertain compliance, so that ORS and [the] Commission may take additional action, if any, that they deem necessary based on the results of these tests." The Commission cited the fact that "a number of [CWS's] customers complained of poor water quality" and noted that there was "no

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testing data in the record which would allow [the] Commission to make findings regarding the odor, taste or turbidity of the Company's water" and concluded that this "anecdotal evidence" was sufficient to support its conclusion in this regard. In its order denying CWS's petition for rehearing or reconsideration, the Commission cited S.C. Code Ann. §58-4-50(A)(6) (Supp. 2004), S.C. Code Ann. §58-5-210 (1976) and S.C. Code Ann. Regs. R. 103-700(B) (1976) and R 103-770 (1976) as the source of its authority to order ORS to develop and engage in this testing. In its answer to CWS's petition for judicial review, ORS has admitted that the Commission lacks authority to require ORS to develop and conduct water quality tests. The Court agrees with CWS and ORS on this point.

Initially, the Court notes that the legislature has indicated its clear intent that ORS is "not subject to the supervision, direction, or control of the commission. S.C. Code Ann. § 58-4-20(B) (Supp. 2005). Furthermore, the Commission has no authority under §58-4-50(A)(6) to order ORS to develop or conduct tests pertaining to the aesthetic quality of CWS's water.[10] To the contrary, this section provides that one of ORS's duties and responsibilities is to "upon request of the commission, make studies and recommendations to the commission with respect to standards, regulations, practices or service of any public utility pursuant to the provisions of this title." Here, rather than requesting ORS to make a study regarding the taste, odor or turbidity of CWS's water and provide its recommendation to the Commission, the Commission ordered ORS to develop and conduct specific tests related to the aesthetic quality tests of CWS's water which the Commission will use to form the basis for such further action as the Commission deems necessary. This in effect eliminates the statutory role envisioned by the legislature for ORS

[10]The Commission's orders are silent on the point of whether it believes CWS's water is potable and the water quality reports admitted as Hearing Exhibit 15 would appear to resolve any question in that regard affirmatively.

when the Commission makes a request under §58-4-50(A)(6), which is to make a study in a manner of ORS's choosing and then make a recommendation to the Commission.[11] In its order denying rehearing or reconsideration, the Commission freely acknowledges this part of its order to be "a mandate to ORS to develop and conduct tests in these areas". Because the Court concludes that the plain meaning of §58-4-50(A)(6) does not confer any authority on the Commission to "mandate" that ORS develop and conduct specific tests, the Commission's interpretation of this statute is overturned. *S.C. Cable Television, Converse Power, supra.*

Nor does S.C. Code Ann. §58-5-210 support the Commission's finding that it is entitled to order ORS to conduct tests on the aesthetic quality of CWS's water. This provision simply empowers the Commission, "after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and...to regulate...the services of every 'public utility.'" The plain meaning of this code section is that the Commission may, after a hearing, fix an additional or other reasonable standard for service to be followed by every public utility. There is nothing stated in this code section which authorizes the Commission to take any action with respect to ORS. Accordingly, and for the same reasons stated above, the Commission's interpretation of this statute is overturned.

Also erroneous is the Commission's conclusion that it is authorized under R. 103-700 (B) to order ORS to develop and engage in water quality testing. By its own terms, R. 103-700

[11] For example, it is entirely possible that ORS could make a study and conclude that no tests, or no periodic tests, for the aesthetic quality of CWS's water are warranted. It is also entirely possible that ORS may devise other means to make a study of the aesthetic quality of CWS's water, including reliance upon DHEC tests in that area under 24 S.C. Code Ann. Regs. RR. 61-58.10 B, 61-58.2 D(9), 61-58 3.D(10) (Supp. 2005). It is also entirely possible that ORS might conclude that the aesthetic quality of CWS's water is attributable to a bulk source over which the Commission has no jurisdiction.

recognizes that the Commission's authority to promulgate the regulation is derived from §58-5-210. While the Commission may be able to adopt other or additional standards of service under this provision of its regulation, it can only do so in a manner that is consistent with the authority granted under §58-5-210. *Beard-Laney Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948). This would therefore entail a hearing to determine what would constitute such other or additional "just and reasonable standard" for aesthetic water quality. Rather than doing that, the Commission's orders direct ORS to develop and conduct tests based on existing standards, the results of which are to be reported to the Commission so that it may use them to "take such additional action [the Commission] deem[s] necessary." Moreover, consistent with the statute, R. 103-700 is silent with respect to any authority the Commission may have to order ORS to develop aesthetic water quality tests. Because the plain language of R.103-700(B) contradicts the Commission's interpretation, and because this interpretation of the regulation expands the Commission's authority, it, too, is overturned. *Converse Power, Beard-Laney, supra.*

The Court is also constrained to find that the Commission's interpretation of R.103-770 as placing the Commission "well within [its] rights to request that ORS develop tests" pertaining to the aesthetic quality of CWS's water is invalid. As is the case with §58-5-210 and R. 103-700, there is no mention of any authority on the part of the Commission to direct ORS – or any other state agency – to develop water quality tests. To the contrary, the regulation states clearly that CWS's water must "be of such quality as to meet the standards of the **South Carolina Department of Health and Environmental Control**" and provides that CWS "shall have representative samples of the water supplied by it examined **by the responsible state or local government agencies,** or by an approved water laboratory, **at intervals specified by those agencies in accordance with the standards of the South Carolina Department of Health and**

**Environmental Control.**" Thus, the plain language of this regulation is that the standards which apply to the quality of CWS's water are those of DHEC and that CWS is required to provide samples for testing against those standards to the responsible state or local government agencies. The Court is unaware of any provision of law assigning to ORS the responsibility of conducting such tests and the Commission has cited none. The Commission is therefore reversed with respect to its finding that R.103-770 supplies it authority to mandate water testing by ORS. *Converse Power, Beard-Laney,* and *Ogburn-Matthews, supra.*

Finally, and assuming that the Commission had the authority to do so, the Court concludes that there is no substantial evidence of record to support the Commission's conclusion that the aesthetic quality of CWS's water is such that testing by ORS is warranted. First, the Commission did not explicitly find that the aesthetic quality of CWS's water failed to meet the applicable DHEC standards.[12] Further, in its order denying rehearing the Commission acknowledged that it "drew no conclusion regarding the overall quality of the water" and that its determination to require testing was based only upon "a number of complaints about the poor quality of the water." The record reveals, however, that only thirteen (13) of CWS's five thousand eight hundred (5,800) water customers complained to the Commission during the night hearings regarding quality of water.[13] The record also reveals that, of these 13 customers, only five (5) were supplied water from wells operated by CWS and that the remaining eight (8) received water supplied to CWS by bulk suppliers. Moreover, none of the customer complaints regarding water quality were substantiated by non-testimonial scientific data, with the Commission having acknowledged that no testing data was contained in the record before it in

[12]And, as the Court has already noted, the Commission is precluded from making implicit findings of fact. *Able, supra.*



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regard to the "odor, taste or turbidity of the Company's water."[14] Also, the record reveals that DHEC was a party in the case below and did not assert to the Commission that CWS's water failed to meet its standards for turbidity, taste or odor. See S.C. Code Ann. Regs. RR. 61-58.10.B, 61-58.2.D(9), and 61-58.3.D(10) (Supp. 2005). Additionally, ORS noted in its report that it detected no odor when it inspected CWS's water facilities and did not find that the Company's water was substandard in any respect. And, there is nothing in the record describing how improvement of the "odor, taste, color and turbidity" of CWS's water might be practicable. *Cf.* R.103-770. Notwithstanding the foregoing, the Commission has ordered ORS to "develop tests for compliance with 26 S.C. Code Ann. R. 103-770" and to test "the water produced by the facilities connected with this case...in such frequency as [ORS] deems necessary to ascertain compliance."

The Court concludes that a reasonable mind could not conclude, based upon the foregoing, that all water produced by CWS's facilities requires testing with respect to its "odor, taste, color and turbidity" as directed by the Commission. *Hamm v. S.C. Publ. Serv. Comm'n*, 432 S.E.2d at 456 *supra*. The Commission's reliance upon unsubstantiated customer complaints regarding water quality, which complaints were made by a percentage of the total CWS water customer base that can only be characterized as *de minimis*[15] and which were contradicted by the ORS report, is clearly erroneous in view of the substantial evidence of record. The Commission recognized in its initial order that it is bound to observe the ruling of our Supreme Court in

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[13] This is approximately two-tenths of one percent (0.2%) of the Company's entire water customer base.

[14] Again, the record does contain data based upon scientific standards reflecting that the Company's water meets all EPA standards, and thus DHEC standards, for clean drinking water. [Hearing Exh.15]

[15] *Cf. Porter v. PSC and CWS, supra* (holding, *inter alia*, that for expense variation to be considered for ratemaking purposes, it must result in a **material** difference).



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*Heater Utilities, Inc. v. The Public Service Commission of South Carolina*, Op. No. 95-MO-365 (S.C. Sup. Ct. filed December 8, 1995). There, the Supreme Court reversed the circuit court and the Commission under circumstances nearly identical to those in the instant case. As it did in *Heater,* the Commission in this case has merely recounted that a small number of customers complained about poor water quality and (admittedly) had no non-testimonial scientific criteria which would support a finding regarding the aesthetic quality of CWS's water. To the contrary, the Commission ignored the only independent, scientific criteria which was before it – i.e., the testimony of ORS and the findings in its report.[16] Under *Heater,* this conclusion may not be upheld.

Accordingly, and for the reasons stated above, the Commission's orders are reversed to the extent that they mandate that ORS develop and conduct tests for the aesthetic quality of water from CWS's facilities as such exceeds the Commission's authority under law and is unsupported by substantial evidence of record.

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[16]The Commission cited a United States Supreme Court decision and a United States Court of Appeals for the Fourth Circuit decision for the proposition that "'anecdotal' evidence may be permissible in [the] formation of a tribunal's conclusions." *See Florida Bar v. Went for It, Inc.*, 514 U.S. 618, 115 S.Ct. 2371, 132 L.Ed. 2d 541 (1995), *citing Central Hudson Gas & Elec. Corp.* 447 U.S. 557, 100S.Ct. 2343, 65 L.Ed. 2d 341 (1980); *see also Sara Lee Corp. V. Kayser-Roth Corp.*, 81 F.3d 455 (1996). These cases are inapposite for several reasons. First, none of them address the substantial evidence standard which the Commission has acknowledged to be applicable in this case under South Carolina law. *See,* e.g., *Heater, supra.* Further, in both *Florida Bar* and *Sara Lee*, the evidence presented was anecdotal **and** statistical in nature. Here, by the Commission's own acknowledgment, no statistical data was presented by customers regarding the aesthetic quality of CWS's water. Third, the quantum of anecdotal evidence in the two cases relied upon by the Commission was deemed to have been significant and the related findings persuasive with respect to the conduct being alleged. Here, and as the Court has already noted, the number of customers complaining about the aesthetic quality of

2. Requiring CWS to File Copies of all DHEC Notices of Violation it Receives

For many of the same reasons that its determination with respect to aesthetic water quality testing was error, the portion of the Commission's orders requiring that CWS file with the Commission and ORS copies of all notices of violation issued to CWS by DHEC is likewise erroneous. The regulation provisions relied upon by the Commission, S.C. Code Ann. Regs. RR. 103-514(C) and 103-714(C) (Supp. 2003), state as follows:

> All Wastewater [or Water] utilities under the jurisdiction of the Commission shall file with the Commission in writing a notice of any violation of PSC or DHEC rules which affect the service provided to its customers. This notice shall be filed within 24 hours of the time of the inception of the violation and shall detail the steps to be taken to correct the violation, if [the] violation is not corrected at the time of occurrence. The Company shall notify the Commission in writing within 14 days after the violation has been corrected.

Thus, the plain meaning of these regulations is that CWS is only required to report to the Commission any notice of violation of a DHEC rule **which affects CWS's water or sewer service to its customers**.[17] Therefore, the Commission has impermissibly expanded the scope of these regulations. *Converse Power, Beard-Laney, supra.*

In support of its interpretation of these regulations the Commission determined that "DHEC violations, by their very nature, affect the service provided to [CWS's] customers" and

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CWS's water is *de minimis* and therefore would not be material to a determination of the quality of all of CWS's water. *Cf. Porter v. PSC and CWS, supra.*

[17] In its order denying rehearing, the Commission stated that it "merely interpreted our own regulation by holding that DHEC violations, by their very nature, affect the service provided to Carolina Water Service customers and, as such, all DHEC violations are reportable." Interpretation of a regulation is unnecessary where, as here, it has a plain meaning. *Converse*, also *cf. Tilley v. Patterson*, 366 S.C. 361, 585 S.E.2d 292 (2003). Given that the regulations are unambiguous, the Commission's reading is incorrect since it requires reading the regulation as containing surplusage. *Brunson v. Smith*, 188 S.C. 75, 198 S.C.2d 184 (1938). There simply would have been no reason to include the words "which affect the service provided to its customers" in these regulations if they were intended to mean that all violations of DHEC regulations affect service to customers.



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therefore CWS was obligated to file every notice of violation it received from DHEC with the Commission. In addition to being inconsistent with the plain meaning of these regulations, no factual basis exists to support the Commission's findings in this regard. The record reveals that CWS incurred fines in the test year for an undetermined number and nature of violations of DHEC rules. CWS did not seek to recover these fines in its allowable expenses. A witness for ORS did initially assert that these regulations required that CWS file with the Commission all DHEC notices of violation received by CWS. However, this witness did not rebut the contention of CWS's witness that the regulation did not apply unless a violation affected service to a customer. Further, in its proposed order submitted to the Commission, ORS did not include a finding of fact or conclusion of law that implicated these regulations. Moreover, in its answer to CWS's petition for judicial review, ORS has admitted that the regulations in question do not require that CWS file all DHEC notices of violation, but only those notices of violation which affect service to customers. Regardless of ORS's view of the meaning of this regulation before the Commission, that view is not factual evidence which can support the Commission's finding that every DHEC violation affects service to the customers of CWS. The Commission has cited to no evidence which supports its conclusion in this regard; to the contrary, the Commission's Orders state that one of its reasons for requiring that CWS file copies of notices of violation was because "there is no record before the Commission explaining the specific nature of these violations". Clearly, then, the Commission had no factual basis to determine that the test year violations, much less all violations, of DHEC rules committed by CWS affected service to customers.

Furthermore, the Court notes that the Commission reasoned that its determination in this regard was justified because "this reporting system will allow ORS to make an informed decision

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about the Company's compliance with DHEC rules and regulations, provide a database on this topic, and will also allow ORS to take action, if any, that it deems necessary in the future." However, the witness for ORS did not, in her testimony, assert that her agency desired any such information or that it desired that CWS file notices of violation with ORS. To the contrary, the ORS witness merely asserted that the Commission regulations required CWS to file DHEC notices of violation with the Commission. Although ORS may indeed desire that sort of information, it did not assert that at hearing and the Commission is precluded from making implicit findings of fact. See *Able, supra*. Therefore, no substantial evidence supports this conclusion of the Commission.

The Court must also respectfully reject the Commission's conclusion that its regulations 26 S.C. Code Ann. RR. 103-500(B) and 103-700(B) permit it to "alter or amend a regulation or to broaden or impose an additional standard in this matter." These regulations provide as follows:

> The adoption of these rules shall in no way preclude the Public Service Commission from altering, amending, or revoking them in whole or in part, or from requiring any other or additional service, equipment, facility, or standard, either upon complaint, upon the application of any utility, or upon its own motion. Furthermore, these rules shall not relieve either the Commission or the Utilities of any duties prescribed under the laws of this State.

Clearly, the Commission may not alter or amend its regulations outside of the procedures of the Administrative Procedures Act ("APA") pertaining to the promulgation of regulations by administrative agencies. See, *inter alia*, S.C. Code Ann. §1-23-110(A) (Supp. 2005) (providing that, "[b]efore the ... amendment of a regulation, an agency shall (1) give notice of a drafting period...(2) submit to the [appropriate Budget and Control Board] division...a preliminary assessment report...[and] (3) give notice of a public hearing") and S.C. Code Ann. §§1-23-120

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and 1-23-125 (Supp. 2005) (requiring legislative approval for regulations unless specifically exempted). The Commission's interpretation of R 103–500(B) and R. 103-700(B) to permit it to effect amendments to RR.103-541(C) and 103-714(C) would be inconsistent with the APA, and therefore must be overturned. *Beard-Laney, supra.*

Nor is the Commission's application of RR. 103-500(B) and 103-700(B) consonant with the plain meaning of the language employed and approved by the legislature. Requiring CWS to file notices of DHEC violations does not require "any other or additional service, equipment, facility or standard" with respect to CWS. To the contrary, the Commission's requirement that CWS file all notices of violation issued by DHEC to CWS is unrelated to service, equipment or facilities to be provided or standards of service to be observed by CWS and simply imposes on CWS a reporting requirement that is inconsistent with other Commission regulations, namely R. 103-514(C) and R. 103-714(C).

Also, the Commission's orders fail to recognize that simply because a public utility receives a notice of violation from DHEC does not mean that a violation has occurred. To the contrary, such a notice simply reflects DHEC's contention that a violation has taken place. The recipient of such a notice has due process rights which permit it to challenge the DHEC contention and, until the challenge is finally resolved, the matter is stayed and there is no determination of a violation. See S.C. Code Ann. §1-23-320 (Supp. 2005), 2006 Act 387 § 4 (to be codified as S.C. Code Ann. § 1-23-600(G)(1)). Thus, a DHEC notice of violation received by CWS informs the Commission of nothing which would constitute substantial evidence supporting future Commission action.

In light of the foregoing, the Commission is reversed with respect to its determination that CWS must file with the Commission and ORS copies of all DHEC notices of violation.



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CWS is, however, obligated to file with the Commission copies of any DHEC notices of violation where such violation affects service to customers and it must do so in the manner provided for under Commission regulations RR.104-514(C) and 103-714(C).

3. Requiring CWS to Compile Customer Complaint Reports to be Provided to ORS

For some of the same reasons the Court has reversed the Commission with respect to the portions of its orders dealing with water testing and the filing of DHEC notices of violations, it is constrained to reverse the Commission's determination that CWS must "generate semesterly reports of its customer complaints and provide them to [ORS] for review and such further action as that agency shall deem appropriate."

The Commission, in its order denying rehearing, cites to the fact that a company witness "testified that no periodic reports of customer complaints were generated by the Company, which would allow the company to be aware of the volume of its customer complaints."[18] However, there is no provision of the Commission's regulations which require a water or sewer utility to compile such reports. To the contrary, the pertinent regulations provide only that

> Complaints by customers concerning the charges, practices, facilities or services of the utility shall be investigated promptly and thoroughly. Each utility shall keep a record of all such complaints received, which record shall show the name and address of the complainant, the date and character of the complaint, and the adjustment or disposal thereof.

[18]Even this conclusion is questionable. A fair reading of the entirety of the testimony of the Company witness in this regard is that information from which the number of complaints in a month can be determined is available to him, but that he could not testify to the number of complaints received by the Company in a given month while he was on the witness stand and being examined by one of the commissioners.



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See 26 S.C. Code Ann. Regs. RR. 103-516 and 103-716 (Supp. 2005).[19] Accordingly, the Commission's action is not supported by its regulations dealing with the compilation and reporting of customer complaints. *Converse Power, Beard-Laney, supra.*

Furthermore, the complaint compilation and reporting requirement imposed by the Commission in its orders does not relate to any "other or additional service, equipment, facility or standard" to be provided, obtained or observed by CWS and therefore does not fall within the ambit of Commission regulations RR. 103-500(B) or 103-700(B). Thus, neither of these regulations support the Commission's action in this regard. *Converse Power, Beard-Laney, supra.*

Also, there is no substantial evidence of record that compiling such a report for submission to ORS is necessary. To the contrary, the only evidence of record in this regard is that ORS found that the Company's complaint recording and documentation procedures were consistent with Commission regulations and satisfactory to ORS. Furthermore, although the Commission relies upon "a great deal of testimony from CWS customers" to support its conclusion that complaint data should be compiled and reported to ORS, the Court notes that only approximately 0.3% of the Company's total customer base testified in this case and that the Commission's orders do not set forth facts which support the conclusion that additional compilation and reporting of customer complaint data was warranted. *Cf. Heater, supra*, S.C. Code Ann. §1-23-350 and *Able, supra.*

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[19]In fact, and as was pointed out by CWS at hearing, the Commission has eliminated from these regulations the requirement that water and sewer utilities compile and provide to the Commission an **annual** summary of complaints which are unresolved for a period of time greater than ten days. See 26 S.C. Code Ann. Regs. RR. 103-516 and 103-716 (1976). This Court must presume that the Commission, in adopting these amendments, intended to make a change in them. *Converse Power, supra*, 350 S.C. Ann. *48*, 564 S.E.2d at 346. Rather than expanding, the



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Based upon the foregoing, the Commission is reversed with respect to its determination that CWS is required to compile and report to ORS on a semesterly basis customer complaint data.

## IV. CONCLUSION

For the foregoing reasons, the orders of the Commission are reversed in part and the matter is remanded to the Commission for further proceedings consistent with the provisions of this order.

November 28, 2006

Presiding Judge

WE SO MOVE:

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Commission has reduced the obligation of water and sewer utilities to compile customer complaint data.

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